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124-483

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1266.

THE UNITED STATES, PLAINTIFF,

vs.

SIGISMUND HESS, ALIAS SAMUEL HAYES.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 20, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1266.

THE UNITED STATES, PLAINTIFF,

vs.

SIGISMUND HESS, ALIAS SAMUEL HAYES.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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11499

1 Circuit Court of the United States of America for the southern district of New York, in the second circuit.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of January, in the year of our Lord one thousand eight hundred and eighty-seven, and continued by adjournment to and including the eighth day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that Sigismund Hess, otherwise called Samuel Hayes, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the third day of March, in the year of our Lord one thousand eight hundred and eighty-seven, at the southern district of New York, and within the jurisdiction of this court, having theretofore devised a scheme to defraud divers other persons to the jurors aforesaid as yet unknown, that is to say, a scheme for obtaining money from such persons upon and by the representation

2 that he, the said Sigismund Hess, otherwise called Samuel Hayes had then and there for sale and would sell large quantities of false and counterfeited obligations and securities of the United States, which said scheme he, the said Sigismund Hess, otherwise called Samuel Hayes, then and there intended to effect by inciting such other persons to open communication with him, the said Sigismund Hess, otherwise called Samuel Hayes, by means of the Post-Office establishment of the said United States, did unlawfully, in and for attempting to execute said scheme, receive from the post-office of the United States at the city of New York a certain letter in the words and figures following, that is to say:

"BANILLA, D. T., 2, 25, 87.

"DEAR SIR: If there is any money to be made at it then count me in. Send on all the confidential terms you have and you will never be betrayed by yours,

"Truly

"J. M. DAVIS.

"Return this letter."

3 which said letter was then and there inclosed in a sealed envelope, addressed and directed in words and figures following, that is to say:

"S. BRUNK, Esq.,

"270 *West 40th St., New York City, New York.*

"℅ Boot Black."

against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided.

4 *Second count.*

And the jurors aforesaid, on their oath aforesaid, do further present, that Sigismund Hess, otherwise called Samuel Hayes, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the third day of March, in the year of our Lord one thousand eight hundred and eighty-seven, at the southern district of New York, and within the jurisdiction of this court, having theretofore devised a scheme to defraud divers other persons to the jurors aforesaid as yet unknown, which said scheme he, the said Sigismund Hess, otherwise called Samuel Hayes, then and there intended to effect by inciting such other persons to open communication with him, the said Sigismund Hess, otherwise called Samuel Hayes, by means of the Post-Office establishment of the said United States, did unlawfully, in and for attempting to execute said scheme, receive from the post-office of the United States at the city of New York a certain letter in the words and figures following, that is to say:

5 "BONILLA, D. T., 2, 25, '87.

"DR. SIR: If there is any money to be made at it, then count me in. Send on all the confidential terms you have, and you will never be betrayed by yours,

"Truly,

"J. M. DAVIS."

"Return this letter."

which said letter was then and there enclosed in a sealed envelope, addressed and directed in words and figures following, that is to say:

"S. BRUNK, Esq.,

"270 *West 40th St., New York City, New York.*

"% Boot Black."

against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided.

STEPHEN A. WALKER,
U. S. Attorney.

6 At a circuit court of the United States for the second circuit and southern district of New York, begun on the day of , in the year one thousand eight hundred and eighty- , and continued, by adjournment, to and including the day of , in the year one thousand eight hundred and eighty- , and on the day last aforesaid, at the city of New York, in the district and circuit aforesaid.

Present: The Hon. Charles L. Benedict, judge.

THE UNITED STATES
against

A bill of indictment having been presented against the said defendant by the grand jurors of the said district, in manner and form hereinbefore

set forth, and the said cause having been duly tried by a jury at a circuit court of the United States for the district and circuit aforesaid, begun on the day of , in the year one thousand eight hundred and eighty- ; and the jury aforesaid having found therein a verdict of "guilty," and the defendant having been heretofore remanded to await the sentence of the court. Now, on motion of Stephen A. Walker, esq., United States attorney for the southern district of New York, the defendant being here present in court. It is ordered that the said defendant be imprisoned in for the term of and that he pay a fine of dollars. And it is further ordered that the fine aforesaid be forthwith docketed as a judgment of this court.

(Indorsed:) U. S. circuit court. The United States of America *vs.* Sigismund Hess, otherwise called Samuel Hayes. Indictment, scheme to defraud. U. S. Rev. St., § 5480. Stephen A. Walker, U. S. district attorney. A true bill. Edw'd King, forman; U. S. circuit court. Filed Mar. 8, 1887. Timothy Griffith, clerk.

Filed in open court, the 18 , March 9, 1887, the defendant *arranged* and indict. read. Deft. plead not guilty. ,18 , the defendant called on . Recognizance and appearing same . , March 10, 1887, the defendant tried. Verdict, guilty. 18 , sentence.

7 At a stated term of the circuit court of the United States of America for the southern district of New York, begun and held at the United States court rooms in the city of New York on 17th day of , in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Hon. William J. Wallace, the Hon. Charles L. Benedict, judges.

THE UNITED STATES OF AMERICA
vs.
SIGISMUND HESS, ALIAS SAMUEL HAYES.

This case coming on to be heard upon the reargument of a motion for a new trial, and in arrest of judgment, the following questions oc-
8 curred, upon which the judges holding the court were divided in opinion:

I. Does the second count of the indictment, upon which count alone the case was submitted to the jury and the conviction found, sufficiently describe an offence under section 5480, Revised Statutes?

II. If there is any defect or imperfection in the second count of the indictment, is it in matter of form, only not tending to the prejudice of the defendant, and within the provisions of section 1025, Revised Statutes?

III. If there is a defect or imperfection in the second count of the indictment, is it aided and cured by the verdict?

Whereupon, on motion of United States by their district attorney, it is
9 ORDERED, that the points upon which the judges disagree, as hereinbefore stated under their direction, be certified under the

seal of the court, together with a copy of the indictment and an abstract of the record, to the Supreme Court of the United States for final decision.

WM. J. WALLACE.
CHAS. L. BENEDICT.

(Endorsed:) U. S. circuit court, southern district of New York. The United States versus Sigismund Hess, alias Samuel Hayes. Certificate of division, U. S. circuit court. Filed Oct. 17, 1887. Timothy Griffith, clerk.

10 THE UNITED STATES
vs.
SIGISMUND HESS, *alias* SAMUEL HAYES. } Scheme to defraud.

1877.
March 8. Filed indictment.
" 9. Def't pleads not guilty,
" 10. " tried; verdict guilty.
May 12. Filed notice of motion in arrest of judgment, &c.
" 19. Filed recognizance.
" 20. " "
June 15. " order for reargument of motion for new trial.
Oct. 17. Filed certificate of division.

11 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages from No. one (1) to No. ten (10), inclusive, contain a true and complete transcript of the indictment, certificate of division, and abstract of the record in the cause of the United States of America vs. Sigismund Hess, otherwise called Samuel Hayes, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the second circuit, this nineteenth day of October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and twelfth.

TIMOTHY GRIFFITH,
Clerk.

(Indorsement on cover:) No. 1266. The United States, plaintiff, vs. Sigismund Hess, *alias* Samuel Hayes. S. New York, C. C. U. S. Filed October 20, 1887.

124-483

124-483

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, PLAINTIFF,
vs.
SIGISMUND HESS, ALIAS SAMUEL HAYES. } No. 1266.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, PLAINTIFF,
vs.
SIGISMUND HESS, ALIAS SAMUEL HAYES. } No. 1266.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

The defendant, Sigismund Hess, on the 8th day of March, 1887, was indicted in the circuit court of the United States for the southern district of New York for a violation of section 5480 of the Revised Statutes, by devising a scheme to defraud, and receiving a letter from the post-office of the United States at the city of New York in attempting to execute the scheme. He pleaded not guilty. A jury was sworn, which on the 10th day

of March, 1887, returned a verdict of guilty. Motion was made in arrest of judgment, on the argument of which three questions arose on which the judges holding the court disagreed and certified a difference of opinion.

SECOND COUNT.

The second count of the indictment is as follows:

And the jurors aforesaid, on their oath aforesaid, do further present that Sigismund Hess, otherwise called Samuel Hayes, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore to wit, on the third day of March, in the year of our Lord one thousand eight hundred and eighty-seven, at the southern district of New York, and within the jurisdiction of this court, having theretofore devised a scheme to defraud divers other persons to the jurors aforesaid as yet unknown, which said scheme he, the said Sigismund Hess, otherwise called Samuel Hayes, then and there intended to effect by inciting such other persons to open communication with him, the said Sigismund Hess, otherwise called Samuel Hayes, by means of the Post-Office establishment of the said United States, did unlawfully, in and for attempting to execute said scheme, receive from the post-office of the United States at the city of New York a certain letter in the words and figures following, that is to say:

"BONILLA, D. T., 2, 25, '87.

"DR. SIR: If there is any money to be made at it, then count me in. Send on all the confidential terms you have, and you will never be betrayed by yours.

"Truly,

"J. M. DAVIS.

"Return this letter."

which said letter was then and there inclosed in a sealed envelope, addressed and directed in words and figures following, that is to say: "S. Brunk, Esq., 270 West 40th St., New York City, New York, c. o. Boot-Black."

against the peace of the United States, and their dignity, and contrary to the form of the statute of the said United States in such case made and provided.

(Rec., p. 2.)

QUESTIONS CERTIFIED.

THE UNITED STATES OF AMERICA
vs.
SIGISMUND HESS, ALIAS SAMUEL HAYES.

This case coming on to be heard upon the reargument of a motion for a new trial and in arrest of judgment, the following questions occurred, upon which the judges holding the court were divided in opinion:

I. Does the second count of the indictment, upon which count alone the case was submitted to the jury and the conviction found, sufficiently describe an offense under section 5480, Revised Statutes?

II. If there is any defect or imperfection in the second count of the indictment, is it in matter of form only, not tending to the prejudice of the defendant, and within the provisions of section 1025, Revised Statutes?

III. If there is a defect or imperfection in the second count of the indictment, is it aided and cured by the verdict?

Whereupon, on motion of United States by their district attorney, it is

Ordered, that the points upon which the judges disagree, as hereinbefore stated under their direction, be certified under the seal of the court, together with a copy of the indictment and an abstract of the record, to the Supreme Court of the United States for final decision.

WM. J. WALLACE.
CHAS. L. BENEDICT.

(Rec., pp. 3 and 4.)

BRIEF OF ARGUMENT.

The first question is:

Does the second count of the indictment, upon which count alone the case was submitted to the jury and the conviction found, sufficiently describe an offense under section 5480, Revised Statutes?

Section 5480 of the Revised Statutes provides:

If any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside, the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person so misusing the Post-Office Establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information, or

> complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-Office Establishment enters as an instrument into such fraudulent scheme and device.

The essential requirements of the statutory crime charged in the second count are:

I. The devising by the defendant of a scheme to defraud.

II. The intending to effect the fraudulent purpose of the scheme by inciting some other person to open communication with him in pursuance of his scheme, through the Post-Office Establishment of the United States.

III. That in pursuance of the intent of this fraudulent scheme he shall have taken or received a letter or packet through the Post-Office Establishment of the United States.

The general intent of the law is to prevent the use of the Post-Office Establishment of the United States as a means to defraud. That intent is designed to be effected by establishing a statutory crime. All of the elements of that crime are charged in the count substantially in the language of the statute, with the addition of a literal copy of the letter received by the defendant, with proper averments of time and place. The crime charged is a misdemeanor. The general rule as to the requisites of indictments for statutory misdemeanors is stated in the case of the *United States* vs. *Mills* (7 Peters, 142) as follows:

> The general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge

> the offense in the words of the statute. There is not that technical nicety required as to form which seems to have been adopted and sanctioned in cases of felony and with respect to some crimes where particular words must be used, and no other words, however synonymous they may seem, can be substituted; but in all cases the offense must be set forth with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged.

The case cited arose under a statute which subjected any one who should procure, advise, or assist another to criminally violate the postal laws to the same penalties as the principal offender. The indictment charged that the defendant did procure, advise, and assist Joseph I. Straughan to secrete, embezzle, and destroy, a letter; but it did not by a distinct, substantive averment, charge that Straughan did in fact commit the offense. The court ruled the averment was sufficient, although only inferentially made. In the case of *The United States* vs. *Simmons* (96 U. S. R., 362) the court, by Mr. Justice Harlan, restated and qualified the rule in the following language:

> Where the offense is purely statutory, having no relation to the common law, it is, as a general rule, sufficient in the indictment to charge the defendant with the acts coming fully within the statutory description in the substantial words of the statute, without any further expansion of the matter. (1 Bishop's Criminal Procedure, § 611, and authorities there cited.) But to this general rule there is the qualification fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the charge against him, to the end that he may pre-

pare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense.

In the same opinion he further declares:

> It is laid down as a general rule, that "in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance." (2 Whart., § 1281; *United States* vs. *Gooding*, 12 Wheat., 460.)

The case last cited by the learned justice was an indictment under the Slave-Trade Act of the 20th of April, 1818. (3 Stat. L., 450.) Objection was made that there ought to have been a specification of the particulars of the fitting out of the vessel, and that it was not sufficient to allege the act without them. In reply, Justice Story, delivering the opinion, stated:

> The indictment in this respect was the language of the statute, and is as certain as that is. We can not perceive any good reason for holding the Government to any greater certainty in the averments of the indictment. * * * Thus in cases of conspiracy it has never been held necessary to set forth the overt acts or means, though they might materially assist the prisoner's defense. So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is by statute in England made a capital offense, it has always been deemed sufficient to allege the offense in the words of the statute, without setting forth any particulars of the manner or the means.

The case of *The United States* vs. *Nolke* (17 Blatch., 555) was a prosecution for a violation of section 3894 of the Revised Statutes, which provides:

> No letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution.

The first count of the indictment was substantially in the language of the statute, with the letter of the defendant set forth literally, but did not allege the illegal quality of the letter. The statute in its terms is closely analogous to that on which the indictment in this case is founded. On a motion to arrest the judgment the count was sustained. In the case of *The United States* vs. *Pond* (2 Curtis C. C., 265) the rule, with the exception, is thus stated:

> It is sufficient, therefore, unless the words of the statute embrace cases which it was not the intention of the legislature to include in the law.

In the statute under which the indictment in this case was formed "there is" no "scheme or artifice to defraud" that the legislature did not intend to include. What the scheme devised or intended to be devised is, is a subject of evidence, but not a necessary averment. What the fraud intended to be committed was is not a necessary averment, for any and every fraud was intended to be embraced in

the terms of the statute. What means were used to incite the correspondence need not be alleged, for this would be only evidential. Under the statute "the gist of the offense is the abuse of the mail. The mailing of the letter, and the letter itself, showing its unlawful character, constitute the *corpus delicti*." (*United States* vs. *Jones*, 10 Fed. Rept., 469.) In the case of *The United States* vs. *Henry* (3 Benedict, 29) it is ruled:

> In an indictment under the forty-second section of the Internal Revenue Act of July 13, 1866 (14 Stat. L., p. 162), for executing a fraudulent bond, it is not necessary to set out the particulars in which the bond is fraudulent or the particular manner in which the tax was evaded, or in which the bond was used or attempted to be used in fraud of the revenue law, or in which the accused executed the bond or procured it to be executed, or connived at its execution.

It is therefore submitted that no element essential to constitute the statutory crime is omitted in this count.

II.

The second question is:

> If there is any defect or imperfection in the second count of the indictment, is it in matter of form only, not tending to the prejudice of the defendant, and within the provisions of section 1025, Revised Statutes?

Section 1025 of the Revised Statutes is:

> No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall

> the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

There is no material allegation of either form or substance specified in the question submitted, nor does any appear to have been omitted in the indictment.

III.

If there is any defect or imperfection in the count, it is cured by the verdict. In the case of *Heymann* vs. *Queen* (12 Cox's Criminal Cases, 383 and 389):

> The statute enacted that any person adjudged bankrupt shall be deemed guilty of a misdemeanor if within four months next after the presentation of the bankruptcy petition against him he fraudulently removes any part of his property to the value of £10 or upwards.

The indictment did not allege the defendant was adjudged bankrupt. The absence of this averment was decided insufficient to warrant an arrest of judgment after verdict, the court declaring the principle applicable as follows:

> But there is a general rule as to pleading at common law—and I think it right to say that there is no distinction, where questions of this sort arise, between the pleadings in civil and criminal proceedings—that where an averment which is necessary to support a particular part of the pleading has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court after verdict that unless this averment were true the verdict

could not be sustained, in such a case the verdict cures the defective averment, which might have been bad on demurrer.

In the case of *Regina* vs. *Rebecca Goldsmith* (12 Cox's Criminal Cases, 479) it is decided:

> An indictment under 24 and 25 Victoria, c. 96, s. 95, charged that defendant unlawfully did receive goods which had been unlawfully and knowingly and fraudulently obtained by false pretenses with intent to defraud, well knowing that the goods had been obtained by false pretenses with intent to defraud as in this count before mentioned, but omitting to set out what the particular pretenses were: *Held*, That the objection, not having been taken before plea, was cured by the verdict of guilty.

In the case of *Jackson* vs. *Pesked* (1 Maule & Selwyn, 236) Lord Ellenborough states the principle applicable to this case as follows:

> Where a matter is so essentially necessary to be proved that had it not been given in evidence the jury could not have given such a verdict, there the want of stating that matter in express terms of declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict.

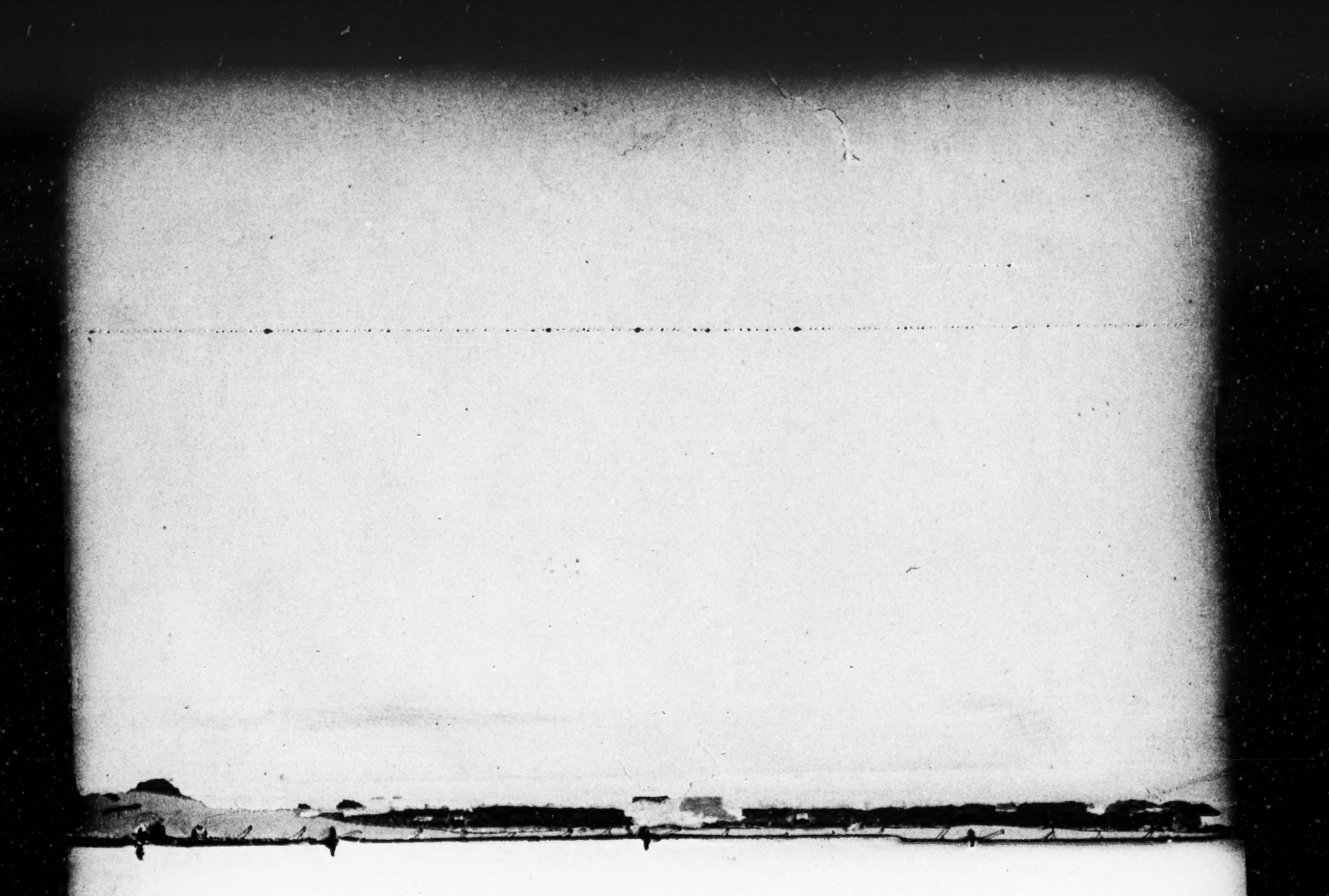
The same rule as to defects cured by verdict is recognized and restated by Mr. Justice Bradley, delivering the opinion of the court in the case of *Lincoln* vs. *Iron Company* (103 U. S., 415), as follows:

> It is a rule of the common law that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on de-

murrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed the judge would have directed the jury to give the verdict, such defect or omission is cured. (1 Wms. Saund., 228.) Or, as it has been tersely put, "a verdict cures a defective statement of a title or cause of action, but not the statement of a defective title or cause of action." (*Id.*, 228 *c*, note.)

It is therefore respectfully submitted the inquiries proposed in this record should be answered in the affirmative.

G. A. JENKS,
Solicitor-General.



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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES
vs.
SIGISMUND HESS. } No. 1266.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

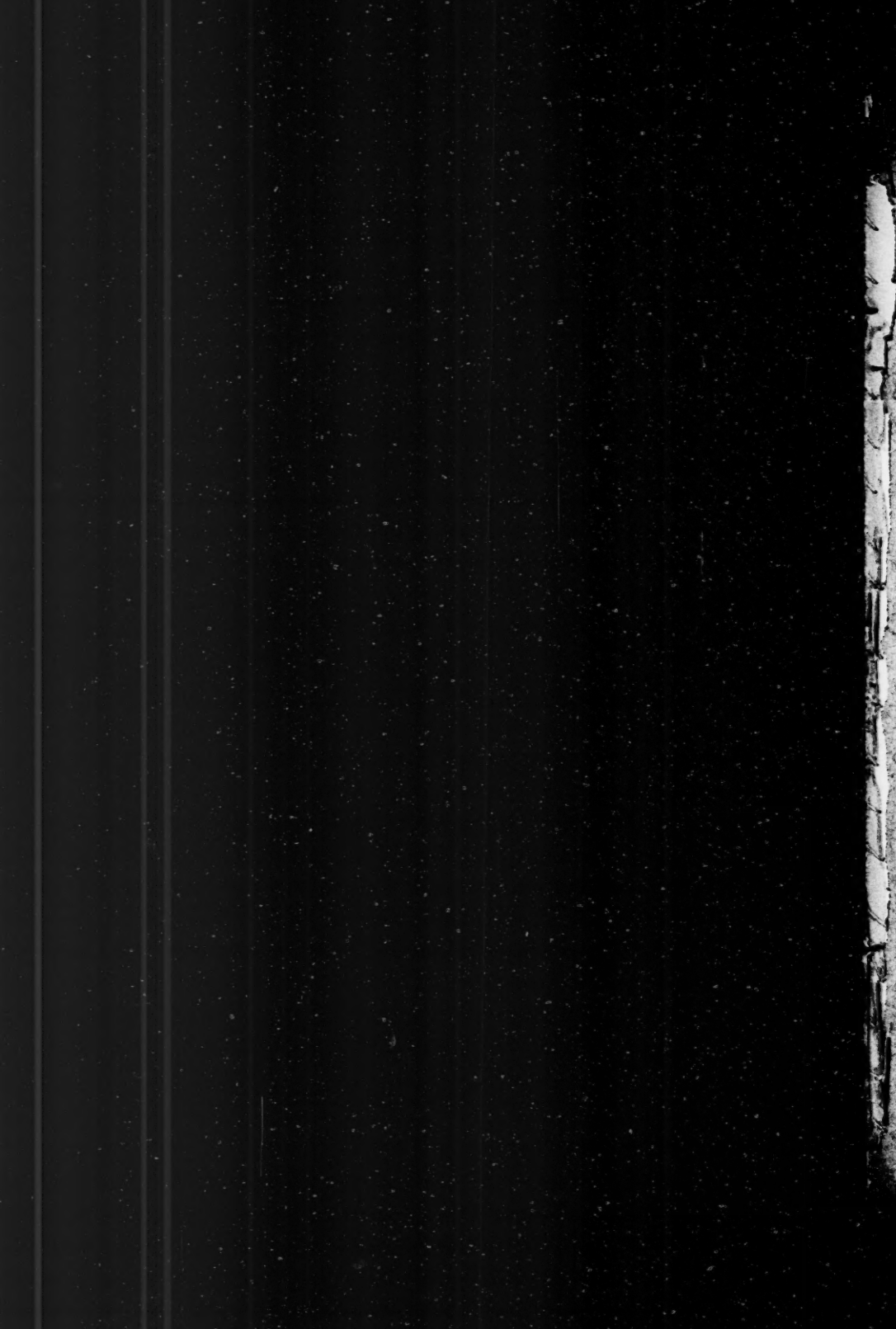
THE UNITED STATES
vs.
SIGISMUND HESS. } No. 1266.

MOTION TO ADVANCE.

Indictment against the defendant, found in the circuit court of the United States for the southern district of New York, second circuit, for a violation of section 5480 of the Revised Statutes of the United States, charging him with having devised a scheme by means of the post-office establishment of the United States, to incite other persons to open communication with him for the purpose of selling false and fraudulent obligations of the United States. Jury sworn, who found defendant guilty. Motion in arrest of judgment and thereupon certificate of division of opinion by the judges.

And now, November 28, 1887, comes the Attorney-General on behalf of the United States, and moves to advance the above-stated case under section 3 of Rule 26.

A. H. GARLAND,
Attorney-General United States.



Supreme Court of the United States.

THE UNITED STATES,

Plaintiff,

vs.

SIGISMUND HESS, ALIAS SAMUEL HAYES,

BRIEF FOR DEFENDANT.

GEO. W. MILLER,

Of Counsel.

Evening Post Job Printing Office, N. Y.

Supreme Court of the United States.

THE UNITED STATES OF AMERICA AGAINST SIGISMUND HESS, otherwise called SAMUEL HAYES.	Brief on Motion in Arrest of Judgment.

This case comes up on a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

The defendant was indicted in the Southern District of New York, and he was tried and convicted in the month of March, 1887, under an indictment which it is respectfully submitted set forth no crime known to the law or the Statutes of the United States. The indictment contained two counts. Upon the trial the Court held and directed the jury that no conviction could be had upon the first count, for the reason that it did not set forth an indictable offense. The case, however, was allowed to go to the jury upon the second count, and upon that count the verdict of guilty was rendered. The indictment was found under section 5480 of the Revised Statutes, and is called in brief, and entitled on the back of it, an indictment for "Scheme to Defraud." It will be observed that in the first count the so-called "scheme to defraud" was described, or the

facts supposed to constitute the scheme were set forth. Upon motion, however, the Court held that the facts set forth did not constitute a scheme to defraud, and that therefore that count could not be sustained. It is supposed that the theory upon which the case was allowed to go to the jury upon the second count was that there was a mere general allegation as to the defendant "having theretofore devised a scheme to defraud" without any statement of the facts or circumstances constituting such scheme, and that possibly this allegation might be sustained as being within the language of the statute, on evidence tending to prove *any scheme to defraud*. The proofs, however, tended to establish, if any scheme, precisely the one set forth in the first count. It is difficult to conceive how the conviction upon the second count, based upon evidence which merely tended to prove the facts alleged in the first count, in regard to the scheme, can be sustained, if it is conceded that such facts were not sufficient to constitute a good count, or proper allegation of the "scheme to defraud."

First.

It is respectfully submitted that no offense or crime is stated in the second count.

"Every offense must, of course, consist of certain facts and circumstances." "And the general rule of pleading, with respect to this part of the indictment, is that all the material facts and circumstances comprised in the definition of the offense, whether by a rule of the common law, or by statute, must be stated; if any one material fact or circumstance be omitted the indictment will be bad" (Archbold's Criminal Practice and Pleadings, 8th edition; Pomeroy's Notes, vol. I., page 265 (marginal page 85), and cases there cited). Every ingredient of the crime must be set forth, &c. (U. S. *v.* Cruikshank *et al.*, 92 U. S., 542; see Op., 558–9).

"And the charges must be laid positively and not inferentially or by way of recital merely, therefore a material

fact laid in an indictment after a *whereas*, would render the indictment bad. So the want of a direct allegation of anything material in the description of the substance, nature, or manner of the offense cannot be supplied by any intendment or implication whatsoever." "The indictment must state *all the facts and circumstances* comprised in the definition of the offense by rule of the common *law or statute* on which the indictment is founded, and these must be stated with clearness and certainty, otherwise the indictment will be bad."

Same authority, Archbold, vol. I., page 275 (marginal page 88).

In the indictment and count in question there is no direct allegation that the defendant did in fact at any time devise a scheme to defraud. The opening portion of the charge being in the nature of a recital, merely, "having theretofore devised." It is submitted that to constitute a good count or indictment it should have been charged directly and affirmatively, that the defendant had in fact devised a scheme to defraud, and furthermore that the facts and circumstances constituting such scheme should have been set forth so that the Court could determine upon the face of the indictment whether or not they did constitute a scheme to defraud. An indictment against a party for obtaining goods under false pretenses which simply alleged that the party "obtained goods by false or fraudulent pretenses," would be palpably bad and insufficient. In all indictments involving the charge of fraud or fraudulent scheme, it is necessary to set forth the particular acts and circumstances claimed to constitute the fraud, fraudulent intent or scheme.

So, it has been held, that "general charges of violating public decency are insufficient to authorize any judgment against the defendant, the specific acts of the indecency must be set out;" also, "where in an indictment for a riot, the charge was that the defendant made a great noise and disturbance of the peace, it was held to be too vague and uncertain, and the indictment therefore defective;" also, "upon the same principle in an indictment for obtaining money under false pretenses, it will not suffice merely to

state that the defendant falsely pretended certain allegations, but it must also be stated by express averments what parts of the representations were false, or the defendant will not know to what circumstances the charge of falsehood is intended to apply." Also, "and in cases of indictment for forgery and threatening letters, the law requires an exact copy of the instrument to be inserted in the indictment in order that the Court may see that it is the subject of forgery or threat within the meaning of the statute;" also, "an indictment for traitorously coining alchemy like to the current coin of the realm," is bad, unless it shows the particular kind of money the metal was intended to resemble. So, also, in an indictment under a general statute concerning the fraudulent hiring a horse, with intent to defraud, etc., it was held, "the general language of the statute is not sufficient, but the representations and to whom made must be particularly alleged. The same rule applies to the statute concerning the obtaining of goods under false pretenses, and to other statutory offenses of the same class."

All the above and many other similar cases are cited in notes on pages 265, 266, 267 and 268 of the first volume of Archbold, before referred to.

It is submitted that unless the indictment sufficiently charges the defendant with having devised a scheme to defraud to "be effected by either opening, or intending to open correspondence or communication with any other person, whether a resident within or outside of the United States," the allegation of the mere receipt from the Post Office of the letter set forth in the indictment, clearly constitutes no offense. Upon the face of it the letter set forth was not only not addressed to the defendant, but there was nothing upon the face of it, or in its terms by reason of which it might not have been written, sent or received in reference to many perfectly honest and legitimate transactions.

Second.

It is respectfully submitted that the language of the section under which this indictment was found, 5480, clearly shows that what was intended to be made a crime consists of three ingredients, at least.

I.—Devising or intending to devise *any* scheme or artifice to defraud.

II.—That such scheme or artifice to defraud was to be effected by either opening or intending to open a correspondence or communication with any other person, whether a resident within or outside of the United States, by means of the Post Office of the United States, &c.

III.—That the defendant, for executing such scheme or artifice, or attempting so to do, must place some letter or packet in a Post Office of the United States, or take or receive one therefrom with like intent.

The gist of the offense, and that without which no offense under the section can exist, is, first, the devising or intending to devise *any* fraudulent scheme. It will be observed that there is no limitation upon this clause as to who shall be defrauded, or that the fraud shall constitute any offense known to the laws of the Federal Government, or exclusively within the jurisdiction of the United States. It is not competent for Congress to pass any act for the punishment of *any* fraud, unless such fraud relates to some matter peculiar to the jurisdiction of the Federal Government. And when an act or an indictment charges a defendant with an offense, under a statute of the United States, it must show that that offense is one of which Congress has jurisdiction. This principle is clearly decided in the case of the United States against Cruikshank, 92 U. S. Reports, 542.

By a grammatical and strict reading of the statute it would appear that it is made an offense "to devise or intend to devise *any* scheme or artifice," either "to defraud, *or* be effected by opening or intending to open a corre-

spondence," &c., no matter whether the scheme is to defraud or not, so long as it is to be "effected by opening or intending to open a correspondence," &c.

Finally, it is respectfully submitted, that the statute itself is extremely loose and unsatisfactory in its language, scope and definition, and that the indictment in this case is clearly insufficient to sustain any conviction, and that the verdict should be set aside, and the defendant discharged.

Upon the argument of the *motion in arrest of judgment* in this case, the Court below suggested its willingness to receive an additional brief, and the following was duly submitted, and now is respectfully submitted, to this Court:

The points upon which the Court suggested further consideration, were:

FIRST.—What averments are necessary to constitute a sufficient indictment, particularly in charging statutory offenses or misdemeanors.

SECOND.—What is meant by charging an offense in the language of the statute, and in what cases is it proper and sufficient to do so.

THIRD.—What defects in an indictment are cured by verdict.

The questions upon which the judges below were divided are stated in the record, page 3, fol. 8, as follows:

"I.—Does the second count of the indictment, upon which count alone the case was submitted to the jury and the conviction found, sufficiently describe an offense under section 5480, Revised Statutes?

II.—If there is any defect or imperfection in the second count of the indictment, is it in matter of form, only not

tending to the prejudice of the defendant, and within the provisions of section 1025, Revised Statutes?

III.—If there is a defect or imperfection in the second count of the indictment, is it aided and cured by the verdict?"

First.

WHAT AVERMENTS ARE NECESSARY TO CONSTITUTE A SUFFICIENT INDICTMENT, PARTICULARLY IN CHARGING STATUTORY OFFENSES OR MISDEMEANORS.

In the consideration of this question in the original brief, under the first point, quotations were made from Archbold's Criminal Practice and Pleadings.

Before going into more minute particulars, it will be well to recall to the attention of the Court the definition of an indictment as given by that eminent authority on Pleading, Chitty, in his Criminal Law, Vol. I., page 168. In defining what an indictment is, or should be, Mr. Chitty says: "In the language of Lord Hale, it is a plain, brief, and certain narrative of an offense committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature." The first general rule is that "they should be found with sufficient certainty; for this purpose the charge must contain a certain description of the crime of which the defendant is accused, and the statement of the facts by which it is constituted, so as to identify the accusation, lest the Grand Jury should find a bill for one offense, and the defendant be put upon his trial in chief for another, without any authority." Page 169. As one of many illustrations he says: "Therefore an indictment charging the defendant with obtaining money by false pretenses, without stating what were the particular pretenses, is insufficient." Page 171. He says further, "It is a general rule in indictments that the

special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the Court that the indictors have gone upon sufficient premises." Page 227. And for many instances and illustrations see pages 228, 229, 230 and 234.

"Every ingredient of which an offense is composed must be accurately and clearly alleged." These general rules have been quoted in innumerable cases. In Lambert *v.* The People of the State of New York, 9th Cowen, 578, the principles referred to were carefully discussed and applied in the case of an indictment for conspiracy to cheat and defraud a certain incorporated company (naming it), and divers others unknown, of their effects, &c., which indictment although rather general in its language was certainly more specific in identifying and pointing out the the particular offense intended to be charged than the one now under consideration. In that case it was distinctly held by the Court of Errors, "That every indictment must contain a certain description of the crime, and a statement of the facts by which it is constituted." Certain exceptions are noted. Further, that where an indictment for a conspiracy does not set forth the object specifically and show that such object is a legal crime, it should particularly set forth the *means* intended to be used by the conspirators, *and show that those means are criminal, otherwise, it charges no crime which the law can notice.* Further, "An indictment charging generally that the defendants conspired to defraud an individual, and not showing the intended means by which the fraud is to be compassed, is bad." The prevailing opinion in this case critically examines the case of The King *v.* Gill and Henry, 2nd Barnwell and Alderson, 204, which was referred to by the Court upon the argument of this motion. We commend this whole opinion to the examination of the Court.

Further authorities as to what averments are generally necessary in an indictment seem to be unnecessary and any extended citation of authorities on that subject would seem to be superfluous here. We shall refer to a sufficient number in the consideration of the next point, the two points being involved in the same general considerations.

Second.

WHAT IS MEANT BY CHARGING AN OFFENSE IN THE LANGUAGE OF THE STATUTE, AND IN WHAT CASES IS IT PROPER AND SUFFICIENT TO DO SO.

It is submitted that the language frequently used by Judges in stating as a general rule that it is sufficient to describe a statutory offense in the language of the statute is either carelessly used, or the intention and effect of it misapprehended. It certainly cannot be held to be a sound general rule that an indictment under a statute is sufficient, which after setting forth the precise language of the statute *in hæc verbæ* should simply charge that at a given time and place, the defendant was guilty of a violation of it. What is undoubtedly intended when this rule in regard to using the language of the statute is mentioned, is, that the general description of the offense may be made in the language of the statute, provided, however, that it is accompanied by such a statement of the facts and circumstances as will fairly and with reasonable certainty inform the accused, and the Court of the particular offense charged, and such facts as will show that it is such an offense as was intended to be covered by the statute, and as in law may constitute a crime.

Although many loose statement of the general rule referred to may be found, it is respectfully urged that whenever and wherever a case at all similar to the one at bar has come up for consideration in any Court going carefully into the subject, the general rule referred to has been modified, or held to be subject to innumerable exceptions, and it is difficult to find a single well considered case, and we may say that we have been unable to find any well considered case, where the mere language of the statute has been held to be sufficient, except a very few exceptions noted in the case in the 9th of Cowen, page 537, and in other cases which will hereafter be referred to.

It will be extending the limits of this brief too far to attempt to give anything like all the authorities upon this subject, but we will refer to a few which we think will be

sufficient to guide the Court to a correct conclusion on this whole subject. The first case to which we call attention is the one cited upon the original brief The United States *vs.* Cruickshank, 92 U. S., 342. This case was an important one, and came up upon motion in arrest of judgment after conviction, was ably argued by eminent counsel, and two opinions were delivered and are reported, one by Chief Justice Waite, another, purporting to be a dissenting opinion by Mr. Justice Clifford. That it was a dissenting opinion however, appears upon examination to have been a mistake of the reporter for it fully concurs in the principles ably enunciated in the opinion of Chief Justice Waite and in the judgment arrived at, and adds many additional and valuable considerations. In this case the accused was charged in the indictment in the language of the statute. Particular attention is called to the opinion of the Chief Justice at page 557, where he says: "According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or Laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent those citizens in the free exercise and enjoyment of "every, each, and all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all."

It would appear from this that the argument had been pressed that the indictment was sufficient because the offense was described in the language of the statute. There was no dispute about that, but the learned Chief Justice, admitting the use of the general language of the statute, clearly holds that it was insufficient, and that it in fact did not identify or describe any offense with sufficient certainty to warrant a conviction under it. As he says, "There is no specification of any particular right;

the language is broad enough to cover all." So in the case at bar, assuming that the first paragraph of the second count of the indictment charges the defendant with having devised a scheme to defraud divers other persons to the jurors aforesaid as yet unknown, there was no specification of any particular scheme to defraud, and there is nothing whatever to point to, identify or distinguish the particular scheme which was imputed to the defendant. It surely cannot be questioned for a moment that his *having devised a scheme to defraud* was one of the main ingredients of the offense sought to be charged; and being such, it should be identified and rendered reasonably certain.

The Chief Justice in the case referred to proceeds to say, "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amend. VI. In United States *v.* Mills, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in United States *v.* Cook, 17 Wall., 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch., Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone; a crime is made up of acts and intents, and these must be set forth in the

indictment, with reasonable particularity of time, place and circumstances." In this quotation, we think, is found the true key to what should be considered the rule as to averments necessary to an indictment for a statutory offense. At all events, what is not sufficient in such an indictment, where the definition of the offense includes generic terms, is made clear. In such cases the mere use of the generic terms is insufficient, and the indictment must state the species; it must descend to particulars. "Facts are to be stated, not conclusions of law alone," &c. If the words used in the statute and indictment now under consideration, "devised a scheme to defraud," can be held to mean or imply anything known to the law as criminal, they are, to say the least, in the broadest sense, merely generic terms, and the use of those words cannot, by any possibility, be held to dispense with the necessity of "stating the species, descending to particulars," "stating facts, and not conclusions of law alone." It is no answer to say that the particular offense charged in the second count is identified by setting forth the letter therein referred to. To send or receive such a letter, without having devised a scheme to defraud, would be no offense under any law, and that letter might apply to any of a thousand different and perfectly legitimate matters or transactions. The gravamen of the offense is, first and foremost, the devising a scheme to defraud, which scheme was to be carried out or effected by a misuse of the mails. The Chief Justice, on page 558, continues: "It is a crime to steal goods and chattels, but an indictment would be bad that did not specify, with some degree of certainty the articles stolen. This because the accused must be advised of the *essential particulars* of the charge against him, *and the Court must be able to decide whether the property taken was such as was the subject of larceny.* So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offense must contain allegations setting forth the *means* proposed to be used to accomplish the purpose. This because, to make such a purpose criminal, the conspiracy must be to cheat and defraud *in a mode made criminal*

by statute; and, as all cheating and defrauding has not been made criminal, it is necessary for the indictment *to state the means* proposed, in order that the Court may see that they are, *in fact, illegal.* State *v.* Parker, 43 N. R., 83; State *v.* Keach, 40 Vt., 118; Alderman *v.* The People, 5 Mich., 414; State *v.* Roberts, 34 Me., 32. In Maine it is an offense for two or more to conspire with the intent, unlawfully and wickedly, to commit any crime punishable by imprisonment in the State Prison (State *v.* Roberts); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the Court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the Court, not the prosecutor. Therefore the indictment should state the particulars, to inform the Court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the ACTS charged will, if proved, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them."

Applying what has been thus stated by the Chief Justice to the case at bar how can it be said that the Court in

question advised the accused of the essential particulars of the charge against him, and how can the Court decide whether the scheme to defraud, of which evidence may have been given before the Grand Jury, or which was intended to be covered was such a scheme as was the subject of any crime or offence. How are the words "devising a scheme to defraud" to be construed by any Court as constituting any ingredient of a crime without the particulars being set forth which show that the scheme to defraud was made criminal by some statute or by the common law. Does it not follow that the count in question lacks "the certainty and precision required by the established rules of criminal pleading—that it is so defective that no judgment of conviction should be pronounced upon it?"

Surely we may well apply to this case the following language of Mr. Justice Clifford, to be found in the same case, page 569: "But it is obvious that, if such a description of the ingredient of an offence created and defined by an act of Congress is held to be sufficient, the indictment must become a *snare* to the accused, as it is scarcely possible that an allegation can be framed which would be less certain, or more at variance with the usual rule that every ingredient of the offence must be clearly and accurately described so as to bring the defendant within the true intent and meaning of the provision defining the offence. Such a vague and indefinite description of a material ingredient of the offence is not a compliance with the rules of pleading in framing an indictment. On the contrary, such an indictment is insufficient, and must be held bad on demurrer *or in arrest of judgment.*"

United States *v.* Simons, 96 U. S. R., 360, on page 360 the Court states the rule and applies it as follows:

"Where the offence is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further extension of the matter.' 1 Bishop. Crim. Proc., sect. 611, and authorities there cited. But to this general rule there

is the qualification, fundamental in the law of criminal procedure, that the accused MUST be apprised by the indictment, with *reasonable certainty*, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, *although it may follow the language of the statute.* Tested by these rules the second count is insufficient."

United States *v.* Carll, 105 U. S. R., 612.

Judge Gray, delivering the opinion, uses the following language:

"In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words, of themselves, fully, directly, and expressly, without any uncertainty or ambiguity set forth ALL the *elements necessary* to constitute the offence, intended to be punished, and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent, and in this case it was held that the omission of such matter was a matter of substance, and not a 'defect or imperfection in the matter of form only,' within the meaning of section 1025 of R. S., and this was a case arising *on motion in arrest of judgment.*"

United States *v.* Britton, U. S. R., 107, page 661.

The opinion in this case refers to the cases heretofore quoted from, and proceeds to apply the principles deduced as follows:

"The words 'wilfully misapplied,' are, so far as we know, new in statutes creating offenses, and they are not used in describing an offence at common law. They have no settled technical meaning like the word 'embezzle,' as used in the statutes, or the words 'steal, take, or carry away,' as used at common law. They do

not, therefore, of themselves, fully and clearly set forth every element of the offence charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There *must* be averments to show *how the application was made and that it was an unlawful one.*"

Certainly, if charging in the language of the statute that the defendant had wilfully misapplied the funds of an association and in addition thereto specifying the particular association the funds of which were so wilfully misapplied was not sufficient to constitute a valid indictment, it is very difficult to conceive how the language used in the count in the case at bar, purporting to charge the defendant with "having theretofore devised a scheme to defraud divers others persons to the jury aforesaid as yet unknown," can be held to be sufficient, or can be held to in any manner designate, specify or identify any particular scheme or devise to defraud, or describe any offense, or any ingredient of an offense known to the law, statute or common. The words are words of conclusion, and in no sense statement of fact. They will apply to any of a thousand different supposable schemes, but designate none in particular. The having devised a scheme, lying at the very foundation of the offense, the other acts only constitute an offense because of the existence of a scheme. The facts constituting the scheme must inevitably be set forth with sufficient certainty to enable the accused to know the particular offense with which he is charged, and the Court to know that the facts alleged are sufficient to constitute an offense within the law.

United States *v.* Thomas, 2 Abbott's U. S. R., 114.

This was a *motion in arrest of judgment*, and although the indictment described the offense in the language of the statute, it was held that it was not sufficient. The charge was smuggling.

Many cases might be cited to show that in all indictments charging a party with obtaining property by false pretenses or tokens, the particular pretenses or tokens must be specifically set forth and their falsity alleged.

Besides this there are other requirements in such indictments unnecessary to be considered here.

That this was long ago considered a settled doctrine was admitted by Boville, *J.*, in the case cited by the Counsel for the United States, in 12 Cox, C. C., 479. At page 483 Boville, *J.*, says: "In an indictment for obtaining property by false pretenses there is no doubt that the false pretenses ought to be set forth. That was long ago decided."

And in Reg. *v.* James, 12 Cox, C. C., 127, it was held that the omission of the words "with intent to defraud" were fatal to such an indictment, and that it was not an amendable defect.

In Hoyman *v.* Queen, 12 Cox, C. C., 383, the indictment did specify the particular goods alleged to have been fraudulently removed, and all the other elements of substance to identify the particular offense. The absence of the averment, that the acts so specified were done in *contemplation of bankruptcy* was the objection considered, and which the Court said would, they thought, have been good on demurrer, but was cured by verdict, not being of the *substance* of the crime. It was held merely an imperfect statement, not an absence or want of statement of facts sufficient to put defendant in possession of the charge and to support a plea in bar.

The charge of conspiracy has been the subject of many contradictory decisions and is peculiar to itself. In the United States *v.* Henry, 3 Ben., 29, the case cited by counsel for the United States, the indictment was for executing a fraudulent Internal Revenue bond, and Blatchford, *J.*, refers to the general rule as to using the language of the statutes in indictments. In this case the object, character and description of the bond were fully set forth, and the bond itself *in hæc verbæ;* and Blatchford, *J.*, in his opinion, quoting with approval from the opinion of Justice Story, in the United States *v.* Gooding, 12 Wheaton, 460, says of the exceptions to the rule, "again, in certain classes of statutes, the rule of very strict certainty has been applied where the common law furnishes a close analogy; such are the cases of indictments for false pretenses and sending threatening letters, where the pretenses and the letters are required to be set forth from the close analogy of perjury and forgery, &c."

What would the Court say to an indictment for making a *fraudulent revenue bond* without in any way designating or describing the bond, or stating facts enough to identify it or show that it was a revenue bond, or any facts from which the Court could determine that the accused had made a fraudulent revenue bond.

As to the general requisites of an indictment we further refer to Barbour's Treatise on Criminal Law, 276. *As to the statement of the facts* see page 289.

In speaking of *indictments under statutes*, on page 290, the following language is used: "Whether the statute be public or private the indictment must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it, and must, with certainty and precision, charge him with having committed or omitted the acts constituting the offense under the circumstances and with the intent mentioned in the statute. The defect will not be aided by verdict, nor by a conclusion *contra formam statuti*."

The District Attorney, in his points, says: "The reception of a letter, not the fraud contemplated, is the *corpus delicti*," citing U. S. *v.* Jones, 10 Fed. R., 469. That case holds no such doctrine. In that case the proceeding was by information, and the charge was *sending*, and not *receiving* the letter set forth. It was held not that the sending merely of the letter constituted the *corpus delicti*, but it was the sending the letter, which, *on its face showed its unlawful character which constituted the corpus and the whole of the offence.* What the particular language of the information was is not stated, and it is immaterial. The point is that the "letter itself showed its unlawful character." It was clearly taken for granted that two elements must co-exist to constitute the crime.

I.—That the letter was sent by defendant.

II.—That its character was unlawful within the meaning of the statute. The letter being set forth, and proved to have been sent by defendant, was held to be sufficient on its face, being the act of the defendant who sent it. Clearly there is nothing in this case to sustain the count

under consideration here. There is, moreover, a clear distinction between a letter *sent*, by the defendant, and one *received*. In the former case, as held above, the letter being the act of the defendant, may itself be sufficient to constitute the whole offence. But in the case of a letter *received*, it would be a clear violation of every principle of evidence and justice to make the mere receipt of a letter, however bad on its face, which may have been sent without any connivance, or even knowledge, on the part of the defendant, a sufficient allegation or sufficient evidence of crime on his part. As before stated, two allegations must co-exist to constitute the offence.

I.—The devising a scheme to defraud.

II.—The receiving a letter with the intent of effecting such scheme—not some other scheme, and hence the absolute necessity of setting forth the particular scheme with which the letter is charged to have connection.

The District Attorney also cites U. S. *v.* Noelke, 17 B. L., 554, which he says is a case in marked analogy with the present. It is submitted, however, that it in no way sustains his contention. The charge in that case was *sending*, not *receiving*, a letter or letters, in regard to a lottery or lottery tickets. The first count was held good, for the reason that the *letter on its face*, which was set forth *in hæc verbæ*, showed it to have been within the statute. The second count was held *bad*, because the letter was not set out, and it did not otherwise properly allege facts to bring it within the statute, and particular attention is called to the fact that the Court particularly held that this was a defect of *substance, and not cured by verdict.*

In the case at bar it cannot be pretended that the letter set forth in the indictment *upon its face* shows the devising of any scheme to defraud, or in any way makes its receipt by defendant a crime within the statute.

Third.

WHAT DEFECTS IN AN INDICTMENT ARE CURED BY VERDICT?

It is respectfully submitted that a verdict of guilty cures defects in an indictment which are merely matters of form and not of substance. This is plain, not only from the language of the section, but from the authorities above cited. Barbour, in speaking of the "effect of the want of general requisites," page 278, says: "If any fact or circumstance which is a necessary ingredient in the offence be omitted, or stated without sufficient certainty, it vitiates the indictment, and the defendant may demur, move in arrest of judgment, or bring a writ of error."

On motion in arrest of judgment, the following language is used on pages 330 and 331: "The causes on which this motion may be grounded, though numerous, are confined to objections which arise upon the face of the record itself, and which make the proceeding apparently erroneous; and therefore no defect in evidence, or improper conduct on the trial can be urged in this stage of the proceedings. But any want of sufficient certainty in the indictment, respecting the time, place or offence, which is material to support the charge, as well as the circumstance of no offence being charged, will cause the judgment to be arrested."

Many of the causes hereinbefore cited arose upon motions in arrest of judgment, and they seem to be sufficient authorities upon this point.

The defect complained of is clearly one of substance and not mere form. It is respectfully submitted that the motion should be granted and prisoner dismissed.

Finally.

It is respectfully submitted that section 5480 is so defective in construction, language and purport as not adequately to define or describe *any* crime or offence.

For convenience of reference the whole section is here set forth:

"SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person so misusing the Post Office Establishment, shall be punishable by a fine of not more than five hundred dollars, and by imprisonment for not more than eighteen months, or by both such punishments. The indictment, information or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the Court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post-Office Establishment enters as an instrument into such fraudulent scheme and device."

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